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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 437

THE UNITED STATES OF AMERICA, PETITIONER

v.

C. T. JAFFRAY, R. H. M. ROBINSON AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 103) is not reported. The opinion of the Circuit Court of Appeals (R. 346) is reported in 97 F. (2d) 488.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1938 (R. 355). A petition for rehearing was denied July 25, 1938 (R. 358).

The petition for a writ of certiorari was filed October 25, 1938, and was granted November 21, 1938. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where a taxpayer has overpaid taxes for several years, which are allowed as overpayments by the Commissioner of Internal Revenue and then credited by him against taxes for other years, the amount thereof being in excess of $10,000, whether the District Court may entertain a suit for refund for the years of original overpayment.

2. Whether it is a jurisdictional prerequisite that a claim for refund shall have been filed setting forth as a ground of recovery the alleged erroneous assessments or untimely collections for the years to which the overpayments were credited.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra,* pp. 40–51.

STATEMENT

This action was instituted on August 29, 1934, in the District Court of the United States for the District of Minnesota by the trustees of the estate of Minnesota and Ontario Paper Company, a corporation, hereinafter referred to as the taxpayer, against the United States to recover internal rev-

enue taxes in the amount of $118,727.61, with interest (R. 1, 14).

The petition alleges, *inter alia,* the filing of income tax returns for the years 1922, 1923, 1924 and 1925, the payment of taxes for those years to the collector of internal revenue then in office, who was out of office at the date the present action was instituted, and the filing of claims for refund of certain of the taxes for each of those years (R. 1, 2–4). The petition alleges that the claims for refund were disallowed to the extent indicated in certain certificates of overassessment (R. 4), but it further alleges that by these certificates of overassessment the Commissioner of Internal Revenue determined overpayments for each of the years 1922 to 1925, inclusive, covering the amounts here in suit, which he credited against taxes claimed by him to be owing for the years 1921, 1926, 1927, 1928, 1930 and 1931 (R. 5–6). Attached to the petition, and by reference made a part thereof, was an agreement under Section 606 of the Revenue Act of 1928, finally agreeing, among other things, to the principal tax liability for the years 1922 to 1925, inclusive (R. 6, 23–25). The petition alleges that the credits applied against the years 1921, 1926, 1927 and 1928 were erroneous and unlawful for reasons set forth at length in the petition relating to the correct tax liability for the years 1926, 1927 and 1928 (R. 6–12) and the correctness and collectibility of the tax for 1921 when the credits were

made (R. 12–14). There was no allegation that claims for refund had been filed for the years 1921, 1926, 1927 and 1928 for the amounts which were alleged by the taxpayer to have been collected and satisfied for those years by credit of the overpayments from the years 1922 to 1925, inclusive.[1]

A demurrer filed by the United States (R. 52) was overruled (R. 68–70), and a motion to dismiss filed by the United States (R. 130) was denied and exception noted (R. 132). At the conclusion of the evidence the motion of the United States for judgment (R. 265, 315) was denied and exception noted (R. 326).

The District Court made findings of fact (R. 77–97) and conclusions of law (R. 97–103). It construed the proceeding as brought for the recovery of overpayments of taxes for each of the years 1922 to 1925, inclusive, and 1928,[2] and held that the court had jurisdiction thereof (R. 97, 103–110). On the merits it held substantially for the taxpayer (R. 98–103, 110–127). On appeal it was held that suit was maintable to recover the overpayments for the years 1922 to 1925, inclusive. The judgment of the District Court on the merits was modified and affirmed. A petition for a writ of certiorari filed

[1] It was alleged that a claim for refund for $7,758.58 paid in cash to the collector was filed for the year 1928, prior to the date the credit was made, but the computations of the District Court (R. 126) show that this amount was properly owing from the taxpayer for 1928, and the taxpayer conceded this in the court below.

[2] See footnote 1, *supra*.

by the United States on October 25, 1938, was granted on November 21, 1938 (R. 360).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that this suit was maintainable as one to recover the overpayments which were admittedly made to the collector by the taxpayer for the years 1922 to 1925, inclusive.

2. The court below erred in not directing dismissal of the cause for lack of jurisdiction.

SUMMARY OF ARGUMENT

The complaint alleges that by an agreement under Section 606 of the Revenue Act of 1928 the Commissioner of Internal Revenue agreed with the taxpayer as to its liability for taxes for the years 1922 to 1925, inclusive; that thereafter the Commissioner issued certificates of overassessment for those years determining overpayments for each year, which overpayments were credited by the Commissioner against outstanding assessments of taxes for the years 1921, 1926, 1927, 1928, 1930 and 1931; that the credits to the years 1926, 1927 and 1928, each in excess of $10,000, were erroneous and unlawful for reasons set forth at length in the complaint going to the correctness of the assessments for the latter years; and that the credit to the year 1921, which was in excess of $10,000, was erroneous and unlawful for reasons set forth in the complaint

going to the correctness and collectibility of the assessment for 1921 at the date of the credit.

The court below sustained the suit as one brought to recover the overpayments for 1922 to 1925, inclusive. On the merits it held that the assessments for 1926, 1927 and 1928 were partially erroneous. The Government conceded in the Circuit Court of Appeals that the 1921 assessment was barred from collection at the date of credit.

We submit that the suit may not be maintained as one for the years of overpayment, 1922 to 1925, inclusive.

Different taxable years are treated as separate and distinct units. When an assessment of taxes has been made, taxes for that year are "then due". Where an overpayment of taxes for one year has been determined, there is a statutory duty upon the Commissioner to credit the overpayment against any taxes then due, and to refund any balance to the taxpayer. Here the directions of the statute have been explicitly followed, and the taxpayer does not argue to the contrary. The United States has not consented to be sued for the recovery of an overpayment of tax where, as here, that overpayment has been disposed of as required by statute.

Although the taxpayer construes its suit as brought to recover part of the overpayments for the years 1922 to 1925, inclusive, the real purpose of the suit is to litigate the merits and collectibility of taxes for other years. Tested by the objective

sought to be attained, the suit is therefore one for the years of the deficiencies. Concededly the District Court could not have entertained the suit as one for the years of the deficiencies, because for each of those years the taxes exceeded $10,000 and their collection was not by a collector of internal revenue, but by the Commissioner in making the credit. Furthermore, the filing of claims for refund for those years was a condition precedent to suit, and no claims for those years were filed.

In addition, no claims for refund were filed for the original years of overpayment containing the grounds relied on in the present suit, namely, the alleged erroneous and illegal assessment and collection of taxes for the years of the deficiencies. Such claims were jurisdictional prerequisites to suit.

The District Court should be held to be without jurisdiction to entertain the suit insofar as it relates to the credit to the barred deficiency for 1921 for the same reasons that it is without jurisdiction as to the credits to the non-barred deficiencies.

ARGUMENT

I

THE CREDIT BY THE COMMISSIONER OF INTERNAL REVENUE OF PORTIONS OF THE ALLOWED OVERPAYMENTS OF TAXES FOR 1922 TO 1925 AGAINST NONBARRED DEFICIENCIES ASSESSED FOR 1926, 1927, AND 1928 PRECLUDES SUIT IN THE DISTRICT COURT FOR THE YEARS 1922 TO 1925, TO RECOVER SUCH PORTIONS EVEN THOUGH IT BE CONCEDED THAT THE DEFICIENCIES WERE IN PART ERRONEOUS

By an agreement under Section 606 of the Revenue Act of 1928, the Commissioner of Internal

Revenue agreed with the taxpayer as to its liability for taxes for the years 1922 to 1925, inclusive. Thereafter the Commissioner issued certificates of overassessment for those years determining overpayments for each year, which overpayments were credited by the Commissioner against outstanding assessments of taxes for the years 1921, 1926, 1927, 1928, 1930 and 1931. The present suit was brought to recover the overpayments for the years 1922 to 1925.

Concededly, the taxpayer could not have brought a suit in the District Court f r the years 1926, 1927 and 1928,[*] because, first, it h. d filed no claims for refund for those years, and second, the collection for those years, which exceeded $10,000 for each year, was made by the Commissioner by the credit from the overpayments for 1922 to 1925, and hence no suit would lie in the District Court against either the collector or the United States. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302.

It is evident, however, from a reading of the taxpayer's complaint that although the action purports to be for the years 1922 to 1925, there was no controversy over taxes for those years. The Commissioner had agreed that the taxes for those years had been overpaid and had credited them pursuant to the statutory mandate against outstanding assessments for other years. The only questions

[*] The taxpayer admitted that the taxes assessed for 1930 and 1931 were proper, and therefore did not attack the credits made to those years.

raised by the complaint relate to the correctness of the assessments and collections for those other years. Thus the taxpayer, under the guise of suing for one year, attempts to litigate, over the objection of the Government, the merits of tax assessments and collections for other years in a forum which does not have jurisdiction to entertain suit for those other years and without complying with a further jurisdictional condition of suit for those other years, namely, the filing of claims for refund. This, we submit, the taxpayer may not do.

(1) It is, of course, well settled that each taxable year is treated as a unit. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Burnet* v. *Thompson Oil & G. Co.*, 283 U. S. 301, 306. It is the essence of our system of taxation that it should produce revenue ascertainable, and payable to the Government, at regular intervals, for only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. *Burnet* v. *Sanford & Brooks Co., supra,* p. 365. To meet the needs of government, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment may be required to precede defense. An assessment of taxes is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. After assessment, taxes are "then due" from the taxpayer re-

gardless of the correctness of the assessment. *Bull* v. *United States*, 295 U. S. 247, 259–260.

Until the passage of the Revenue Act of 1924, a taxpayer who disagreed with administrative officers that additional taxes were due from it could pursue but one course to have that question adjudicated, that is, pay the tax, file a claim for refund, and, upon the expiration of six months or the rejection of the claim, sue in the courts. The Revenue Act of 1924, however, set up an administrative body, the Board of Tax Appeals, to which appeals from the determination of deficiencies could be taken prior to payment. Under that Act notice of the determination of a deficiency must be transmitted to the taxpayer, and an opportunity allowed for appeal. During the period in which an appeal may be taken, assessment of the tax is forbidden.[4] However, if, as in the present case, no appeal from a deficiency is taken to the Board of Tax Appeals, the deficiency "shall be assessed, and shall be paid upon notice and demand from the collector."[5] Thus now, as formerly, when taxes are once assessed, they must be paid prior to a suit to test the correctness of the exaction. Though the taxpayer may have overpaid taxes for other years and though the Government might still have in its hands money to which the taxpayer would be entitled for those years, it must nevertheless pay an assessment when demand is made.

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[4] Section 274 (a), Revenue Act of 1924, c. 234, 43 Stat. 253.
[5] Section 274 (c), Revenue Act of 1924, c. 234, 43 Stat. 253.

Demand for payment in cash of an outstanding assessment, however, will not be made where the taxpayer has overpaid taxes for another year and its liability for that year has been adjusted and the overpayment determined, for in such circumstances the statutes have provided a specific means of collection, that is, by credit of the overpayment against the assessed deficiency. Section 322 (a) of the Revenue Act of 1932, *infra*, p. 45, provides that—

> Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.*

It has been held that the provision of the statutes that an overpayment shall be credited against any tax due is mandatory. *York Safe & Lock Co.* v. *United States*, 40 F. (2d) 148, 153 (C. Cls.); *Woolner Distilling Co.* v. *United States*, 62 F. (2d) 228 (C. C. A. 7th). But whether mandatory or not, it is well settled that the Commissioner has the absolute right to make a credit. *Standard Oil Co.* v. *United States*, 5 F. Supp. 976 (C. Cls.), certiorari denied, 293 U. S. 599; *United States ex rel. Cole* v.

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* Like provisions are contained in other Revenue Acts. See Section 252, Revenue Act of 1918, c. 18, 40 Stat. 1057; Section 252, Revenue Act of 1921, c. 136, 42 Stat. 227; Section 281 (a), Revenue Act of 1924, c. 234, 43 Stat. 253; Section 284 (a), Revenue Act of 1926, c. 27, 44 Stat. 9; Section 322 (a), Revenue Act of 1928, c. 852, 45 Stat. 791.

Helvering, 73 F. (2d) 852 (App. D. C.); *Tull & Gibbs* v. *United States,* 48 F. (2d) 148 (C. C. A. 9th).

As the usual procedure for the recovery of debts is reversed in the field of taxation in relation to the assessment and collection of taxes, so is there a difference in the justiciable rights obtaining as between the Government and its citizens and as between one individual and another. The Government of course may not be sued without its consent, and it also may attach conditions to its consent to be sued when granted. Execution does not issue on judgments against the United States as in the case of individuals, and since the early days of our history judgments have not been paid where the judgment creditor is otherwise indebted to the Government. See Act of March 3, 1875, *infra,* p. 42. Assume that on the date the Commissioner determines an overpayment for one year the taxpayer files suit for that year and the Government confesses judgment. If there is then an outstanding assessment of taxes for another year, that judgment will not be paid to the taxpayer in cash. It will be used to satisfy the unpaid assessment.

The policy of the Act of March 3, 1875, has been carried out in the Revenue Acts. When an overpayment is determined by the Commissioner it is not to be refunded to the taxpayer in cash if there are other taxes then due from the taxpayer. It is to be—it "shall be"—credited against other taxes due and "any balance" refunded. But while not

receiving cash, the taxpayer receives the equivalent of cash when credit is made, for by the credit he is relieved of his obligation to pay the Government in cash and the danger of distraint of his property is removed.

Since an overpayment of taxes is not to be refunded when there are taxes due—that is, have been assessed—for another year, but is to be credited against those taxes, certainly no action will lie against a collector of internal revenue or against the Government for a year of overpayment to have a refund adjudged where the complaint itself shows that the overpayment had theretofore been determined and credited against unpaid assessments. Exact compliance with statutory duty on the part of Government officers cannot give rise to a cause of action against those officers or against the Government. The original wrong of the collector in exacting or accepting excessive payments of taxes will have been righted in the only way permitted by statute. Furthermore, if there be any doubt as to whether the statutes permit a suit against the United States where its officers have complied with the statutes, that doubt should be resolved against the taxpayer, for waivers by the United States of its sovereign immunity from suit are to be strictly construed. *United States* v. *Michel*, 282 U. S. 656.

Taxpayer does not seek, in the present case, an adjudication of its tax liability for the years

1922 to 1925, the years of original overpayment. There is no dispute between the taxpayer and the Government on that issue. The record in the present case is 360 pages in length; yet only a comparatively few sentences deal with the tax liability for the years 1922 to 1925, and then only to show that there was agreement as to those years. There has been, at various times, a controversy between the Government and the taxpayer over every tax return filed by the taxpayer in the fifteen year period from 1917 to 1931, inclusive. For some of the years (1917–1920), the taxpayer has now conceded that it had negligently understated its income (R. 81).[7] For other years (1922–1925) the Government has now conceded that the taxpayer had overpaid its tax (R. 95). For still other years (1930 and 1931) the deficiencies asserted by the Commissioner, which were satisfied by credit from the overpayments from the years 1922 to 1925, were concededly correct.

Of necessity, the present action can result only in an adjudication of the taxpayer's liability for the years to which the overpayments were applied,

[7] See also R. 139–141, 152–162. Cf. *Backus* v. *United States*, 59 F. (2d) 242 (C. Cls.), certiorari denied, 288 U. S. 610, where the Court of Claims recognized the binding effect of the decision of the Board of Tax Appeals determining the additional taxes and "penalty" due from the present taxpayer for the years 1917 to 1920. Although the Government is not in this Court questioning the decision of the court below on the merits, the *Backus* case tends to show that the Government's position on the merits of the years 1926, 1927 and 1928 was well founded.

and the nature of the suit should be judged by the objective sought. The taxpayer does not wish an adjudication of the fact of overpayment, for that had been conceded. The taxpayer cannot wish to compel payment of the overpayment in cash, for that could not be done if the taxes were "due" for another year. The complaint shows that taxes for another year were due at the time of the credit in the sense that the taxpayer was under the then obligation to pay in cash the amount of the outstanding assessments before litigating the correctness of the assessments. Obviously, the only possible object of this suit was to attack those assessments and have them declared erroneous. It was those questions alone, on the merits, with which the court below was concerned.[8] But the assessments and their collection by credit were the acts solely of the Commissioner of Internal Revenue, and the Government may be called in question for his acts,

[8] Demonstrative of the correctness of the statement that the taxpayer cannot and does not sue for the years 1922 to 1925 is the fact that a previous suit had been brought for the year 1922, and had been dismissed with prejudice (R. 144, 265–266). The dismissal with prejudice of the 1922 suit would seem clearly to bar another suit for 1922, at least if the new action is based upon the same grounds. If the new action be treated as based upon different grounds, that is, upon an alleged implied promise of the Commissioner to pay contained in the closing agreement (cf. R. 108–109) the District Court would have no jurisdiction since the amount involved exceeds $10,000 and the collector of internal revenue did not participate in the closing agreement. See Government's brief in *United States* v. *Bertelsen & Petersen E. Co.*, No. 416, present Term, pp. 24–25.

where the amount involved exceeds $10,000, only in the Court of Claims.

The consequences of the taxpayer's contention add additional support to our position. If the taxpayer be correct, a collector of internal revenue, who, we will assume, makes an erroneous collection for one years, may, even after he goes out of office, be compelled to defend in one suit the merits of tax assessments and collections for half a dozen other years with which he has had no connection and without an opportunity on the part of the Commissioner to correct administratively any error that he, the Commissioner, might have made in assessing, or collecting by credit, the taxes for those years. Clearly our revenue laws never contemplated any such procedure.

It is extremely significant that under respondent's theory there is no opportunity for the Commissioner to correct administratively, through the process of a claim for refund, any error which he has made in assessing a deficiency for the year to which the overpayment is credited. If the taxpayer's position be accepted, the correctness of the Commissioner's action in making a credit to another year need not be questioned by a claim for refund; the taxpayer simply brings suit for the year as to which there is no longer any controversy—the year of overpayment—and attacks in the courts the correctness of the assessment for the year of deficiency. The result is not only inconsistent with the whole administrative system estab-

lished by Congress for the adjustment of taxes, but also violates the primary mandate of administrative law that resort to judicial action is justified only after the administrative processes have been exhausted. Compare *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209.

It has long been thought settled that the filing of a claim for refund, setting forth the grounds upon which refund is sought, was a prerequisite to a suit to recover taxes. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. Nor is it any answer to say, as respondents do, that the need for a claim is dispensed with because the rules of pleading and procedure give the Government all the protection it needs or is entitled to have. That answer fails to appreciate the purpose of the rule. As this Court stated in the *Felt & Tarrant* case, *supra* (283 U. S. at 272):

> One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, * * * a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed "to protect all possible legal rights of the taxpayer."

There can be no serious question that the "orderly administration of the revenue" is jeopard-

ized if claims for refund are unnecessary here. The overpayments for 1922 to 1925 have here been applied as credits against assessments of deficiencies for six different years. The assessments for two of the years were concededly correct, and the court below has held that the assessments for three of the other years were in part correct. Orderly administration would certainly seem to require claims for refund directing the Commissioner's attention to the reason why the taxpayer believed the deficiencies to be erroneous, and giving the Commissioner the opportunity to correct any mistake he may have made, without the burdens attendant upon litigation in the courts. The taxpayer's view simply means that the statutory requirement for the filing of claims prescribing the contentions which may later be advanced by suit would effectively be obviated whenever there is a collection of a deficiency by credit rather than in cash. We think it clear that Congress never intended such a result.

Of course, as to the years 1926, 1927 and 1928, to which the parts of overpayments in question for 1922 to 1925 had been credited, suit could have been brought in the Court of Claims if proper claims for refund had been filed. *United States* v. *Swift & Co.*, 282 U. S. 468.* In the *Swift & Co.* case the

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*See also the following cases where suit was entertained for years to which credits were applied: *Cerro de Pasco Copper Corp.* v. *United States*, 13 F. Supp. 633 (C. Cls.), certiorari denied, 298 U. S. 686; *Globe Gazette Printing Co.* v. *United States*, 13 F. Supp. 422 (C. Cls.), certiorari denied, 298 U. S. 682; *Trojan Powder Co.* v. *United States*, 13 F. Supp. 61 (C. Cls.), certiorari denied, 298 U. S. 674; *Foundation Co.* v. *United States*, 15 F. Supp. 229 (C. Cls.).

Commissioner had credited an overpayment of tax for one year against an erroneous deficiency for another year. This Court sustained a suit brought in the Court of Claims for the year of the deficiency, the principal question being whether a timely claim for refund for the year of the deficiency had been filed. The Court said (p. 476):

> * * * the second claim for refund * * * was filed within four years of the payment of the tax, since that payment must be taken to have occurred on the date of the allowance of the credit by the Commissioner's signature approving the schedule of refunds and credits.

Since, by the *Swift & Co.* case, there was a payment of the tax for the year of deficiency by virtue of the credit, it must follow as a corollary that there was a corresponding disposition to and for the use and benefit of the taxpayer to the amount of the overpayment. Hence, no suit could be brought against the Government for the year of the overpayment, for the Government would no longer have in its hands money to which the taxpayer would be equitably entitled for that year. Taxable years are treated as separate and distinct units, as we have shown above, p. 9, and it is impossible for a single sum paid by a taxpayer to be an overpayment in that sum for two different taxable years.

The recent decision in *United States* v. *Botany Worsted Mills*, 98 F. (2d) 880 (C. C. A. 3d), is in full accord with this position. That was a suit to recover interest on an overpayment of taxes for the year 1918 which had been credited against an

assessment of taxes for the year 1917. The assessment for 1917 was later determined to be erroneous, and the amount collected by the credit was refunded, with interest from the date of the credit. The suit sought additional interest from the date of the original payment to the date of the credit. The court denied recovery on the ground, among others, that the legal effect of the credit was a payment by the Government to the taxpayer of the 1918 tax refundable to it and a simultaneous payment by the taxpayer to the Government of the same amount on account of its then outstanding tax assessment for 1917. The credit, the court said (p. 883):

> • • • must be regarded as a valid final closing of the accounts between the Government and the taxpayer so far as the overpayment of 1918 tax was concerned. • • •.
>
> • • • • •
>
> We, therefore, conclude that the refund made in 1931 was of an overpayment of 1917 tax. It follows that the date of the overpayment was September 15, 1921, the date on which the amount overpaid for 1918 was credited by the Commissioner upon 1917 tax, since the credit amounted in law to a payment of the tax to which it was applied. *United States* v. *Swift & Co.*, 282 U. S. 468 • • •.

Our position is also supported by the decision of the Court of Claims in *American Woolen Co.* v. *United States*, 18 F. Supp. 783, 21 F. Supp. 125,

1021. The overpayment there found by the Board of Tax Appeals was credited against a deficiency found by the Board for another year. The court stated (18 F. Supp. at pp. 788–789):

> We have held that when a taxpayer has a decision of the Board in his favor he can bring suit thereon. But this does not mean that where the Commissioner has applied an overpayment found by the Board *in the manner required by law*, the taxpayer can still recover by suit the amount thereof. When the Government shows, as it has in this case, that the amount of the overassessment was credited on a deficiency then due under the decision of the Board, it is a complete defense. [Italics supplied.]

Actually, the case chiefly relied on by the taxpayer here in support of its theory—*United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540—supports instead the position of the Government. As applied to the present case, the statements in the opinion are necessarily dictum, since the issue in that case was whether mandamus would lie to compel a refund of an overpayment found by the Board of Tax Appeals. The Court stated (pp. 542–543):

> When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, § 322 (d), and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the re-

> covery of any refund to which he is entitled. [Three decisions of the Court of Claims cited.] And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund. • • •

We construe the statement that a plenary suit will lie in the District Court or the Court of Claims to mean that the suit will lie solely against the United States, and that the plaintiff has the choice of forums only when the amount involved does not exceed $10,000. Cf. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302. More significant, however, is the reference to the fact that the statute provides that overpayments shall be refunded *or credited,* and that it is upon the Commissioner's *failure to comply* with the statute that a plenary suit lies. Although the case did not involve the question of a credit, it is significant that the opinion states that it is a complete defense to the plenary suit if other taxes are "due from the taxpayer." As we have shown above, pp. 9–10, taxes are "due" when an assessment has been made.

The taxpayer also relies upon *Libby, McNeill & Libby* v. *United States,* 9 F. Supp. 673 (C. Cls.). In that case an overpayment for 1917 was applied to an assessment for 1919, but at the time the credit was attempted to be made the assessment for 1919 had been paid in cash. Suit was allowed for the year 1917, but simply on the theory that the action

of the Commissioner was a nullity, since there was then no tax due for 1919. See 9 F. Supp. at 680.[10]

The taxpayer also relies on *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743. An overpayment of 1916 taxes had been credited against a 1915 deficiency, which, the court assumed for the purposes of the decision, was then barred from collection by the statute. A dictum of the court states that if the suit were construed as a suit to recover the 1916 overpayment the court would have jurisdiction, but recovery was denied on the merits. We believe the dictum to be erroneous. Moreover, in a subsequent decision, *Hammond-Knowlton* v. *Hartford Connecticut Trust Co.*, 89 F. (2d) 175 (C. C. A.

[10] The respondents in their brief in opposition also referred to this case, and others, to show that the Commissioner had at times reversed credits. The instant case does not involve the reversal of credits, and, if there be doubt as to the Commissioner's authority to do so, a decision of the question should await a case where the question is presented. It may be noted, however, that the practice of reversing credits, even if it were other than occasional, cannot have the consequence which the respondent pictures of carrying on litigation forever, for each time the Commissioner makes a credit he relieves the taxpayer of its obligation to pay in cash. If payment were made in cash, a claim for refund and suit would be necessary. No more is required when the collection is by credit. Accordingly, when a credit is reversed from one year and applied to another year, instead of claims for refund and suit being required for two years, as would be the case if the payments had been in cash for both of the years to which the one amount has been credited, only one suit would be necessary, inasmuch as the reversal of the credit grants the taxpayer relief for one of the years.

2d), certiorari denied, 302 U. S. 707, that court has indicated what we believe to be the correct theory, saying (89 F. (2d) at 178):

> In reality it is only the conduct of the Commissioner in disallowing the credit which has affected the appellee. Since this is so, the action against the collector cannot be maintained * * *.

We accordingly submit (a) that no cause of action has been stated for the years of original overpayment, 1922 to 1925, because the complaint itself shows that the overpayments had been determined and had been disposed of in the manner required by law, and (b) that the complaint, while construed by the taxpayer as attempting to state a cause of action for the years of original overpayments, really attempts to state a cause of action for the years of deficiency, and of these years the District Court could have no jurisdiction because the tax for those years was not collected by a collector of internal revenue but was collected by the credit made by the Commissioner, and because no claim for refund had been filed for those years.

(2) We believe, therefore, that the present suit must be considered as brought to litigate the merits and collectibility of taxes for other years, the years of the deficiencies. If that is so, concededly the District Court could not have entertained the suit, because no claims for refund for the years of the deficiencies were filed, and because for each of those years the taxes exceeded $10,000 and their collec-

tion was not by the collector but by the Commissioner in making the credit.

But even if the fact of a credit to another year does not preclude a suit for the year of original overpayment in cash, at least no suit may be maintained for that year unless it meets the requirements of Section 3226. Hence here, even if the suit be construed as the taxpayer seeks to construe it—as a suit for the years of original overpayment in cash—it must fail for lack of a sufficient claim for refund.

Section 3226, Revised Statutes, *infra*, p. 40, provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax until a claim for refund has been duly filed with the Commissioner of Internal Revenue. It is settled by the decisions of this Court that the claim which is required is one which sets forth the grounds which may later be asserted by the suit. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. One of the objects of the requirement for the filing of a claim for refund is to give notice to the administrative officials of the nature of the claim for which suit may be brought, to assure an orderly administration of the revenue, see pp. 17–18, *supra*. Consequently, even if the suit be for the years 1922 to 1925, the real nature of the taxpayer's complaint is nevertheless important in order to ascertain whether the statutory provisions relating to claim for refund have been met.

The matter cannot be dismissed, as the taxpayer seeks to do, by the assertion that claims for refund have been filed, and denied, for the years 1922 to 1925. As we have pointed out above, pp. 13–15, no issue is or can be made of the question whether the collector had collected excessive taxes for the years 1922 to 1925. That was the basis of the claims for refund filed for those years, but that issue is not in dispute. Nor does the taxpayer take the position that it is entitled to a refund in cash if there are taxes "due" for other years. It has conceded that there is a statutory duty placed upon the Commissioner to make a credit of overpayments against taxes for other years if taxes for those other years are "due" (R. 105). It has also conceded that an assessment of taxes by the Commissioner is presumed to be correct, and that (Br. in Opp., p. 9)—

> if the Government as a defense pleads the fact of credit elsewhere, it is the taxpayer's burden to show, if he can, that the deficiency to which the credit was applied was not lawfully owing.

We agree with the taxpayer that the burden is placed upon a taxpayer to show, if he can, that a deficiency to which a credit is applied is not lawfully owing. We disagree, as stated in (1), *supra*, pp. 9–24, that such a showing may be made and recovery had in a suit for the original year of overpayment. But irrespective of that, we believe that it becomes an element of the taxpayer's affirmative case to establish that no deficiency was owing

where, as here, the fact of credit elsewhere is pleaded by the taxpayer itself. Indeed, in such a situation the only issue between the parties may be whether the deficiency was in fact correct. Certainly that is so here.

No claim for refund was ever filed, however, giving notice to the Commissioner that the taxpayer considered the assessment of the deficiencies to be excessive. As we have pointed out above, there can be no question that the orderly administration of the revenue would be furthered in a case such as this—overpayments credited to six different years—by the filing of claims for refund directing the Commissioner's attention to the reasons why the taxpayer believed the credits to be erroneous, and giving the Commissioner the opportunity to correct mistakes before litigation is begun. We can perceive, in other words, no reason why the circumstances of the present case should make it any less necessary that the claims for refund present the contentions which may later be advanced. We think it clear that Congress never intended such a result, and that the taxpayer must fail because proper claims for refund were not filed.[11]

[11] In *Untermyer* v. *Bowers*, 79 F. (2d) 9 (C. C. A. 2d), certiorari denied, 296 U. S. 641, an overpayment for one year was credited against a deficiency for another year. After the credit, a second claim for refund was filed for the original year of overpayment, and upon its rejection suit was brought for that year, and suit was allowed because the second claim for refund had been filed within the statutory period for filing original claims. For the reasons stated in (1), *supra*, we do not agree with that decision, but it is dis-

II

IF SECTION 609 OF THE REVENUE ACT OF 1928 DOES NOT REQUIRE THAT A CREDIT TO A BARRED DEFICIENCY BE CONSIDERED A NULLITY, THE CREDIT BY THE COMMISSIONER OF PORTIONS OF THE OVERPAYMENTS OF TAXES FOR 1922 TO 1925, AGAINST THE BARRED DEFICIENCY FOR 1921 PRECLUDES SUIT IN THE DISTRICT COURT FOR THE YEARS 1922 TO 1925 TO RECOVER SUCH PORTIONS

In the present case, parts of the overpayments for the years 1922 to 1925, inclusive, were applied as credits against deficiencies assessed for the years 1926, 1927 and 1928. At the time of the credits, it is conceded by the taxpayer, the deficiencies were collectible, its contention being that the deficiencies were excessive. We have discussed above the effect of the credits upon these deficiencies.

The interest on the overpayments for 1922 to 1925, inclusive, was applied as a credit against an assessment for the year 1921. The Government's answer (R. 72–73) denied that the assessment for 1921 was erroneous or that it was barred from collection at the time of the credit, but it was conceded in the Circuit Court of Appeals that the assessment was barred.

The District Court stated in its opinion (R. 107) that it was difficult to perceive any substantial distinction between an application of an overpayment to a barred deficiency and the application of an overpayment to a deficiency which did not in fact exist. The Circuit Court of Appeals did not dis-

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tinguishable from the present case on the grounds stated in (2), *supra*. In the instant case, no claim for refund was filed after the credit, much less within the statutory period.

cuss the question whether a distinction should be drawn between the application of a credit against a non-barred deficiency and the application of a credit to a deficiency that was barred from collection at the date of credit.

In the court below the taxpayer argued that the effect of Sections 607 and 609 of the Revenue Act of 1928, *infra*, p. 44, relating to collections of and credits to barred deficiencies is simply to deprive the Government of a defense by way of set-off which it would otherwise have, and that those sections thus operate to place barred deficiencies in a category with deficiencies not barred but simply unlawfully determined.

Section 607 of the Revenue Act of 1928 provides that any tax assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. Section 609 (a) provides that any credit against a liability in respect of any taxable year "shall be void" if any payment in respect of such liability would be considered an overpayment under Section 607.

Because of the provision in Section 609 that a credit against a barred deficiency "shall be void," the Government has in a number of cases argued that such a credit should be treated as a nullity. It made such an argument in *Lowe Bros. Co.* v. *United States*, 304 U. S. 302. The Circuit Court of Ap-

peals in that case had held that a credit against a barred deficiency was not a nullity, but constituted a collection by the Commissioner of the deficiency. This Court, however, stated that it would express no opinion as to whether the credit was a collection of the barred deficiency, since, if there was a collection, it was by the Commissioner and accordingly in no event would suit lie in the District Court for the year of the deficiency.

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, this Court said (p. 424):

> There is also a contention that section 611 does not apply when the tax was paid by the credit of the amount of an overpayment for *another taxable year. But the application* of a credit against an assessment at a time when collection was barred must be regarded as an erroneous collection, and we see no reason for taking such a case out of the statute.

The Circuit Courts of Appeals for the Second and the Sixth Circuits have cited the above decision of this Court as authority for the proposition that the act of crediting an overpayment against a liability barred by the statute of limitations constitutes a collection of the deficiency. *See Gans S. S. Line* v. *Bowers*, 82 F. (2d) 181, 183 (C. C. A. 2d), certiorari denied, 298 U. S. 676; *United States* v. *John Gallagher Co.*, 83 F. (2d) 368 (C. C. A. 6th). *See also United States* v. *Reeves Bros. Co.*, 83 F. (d) 121 (C. C. A. 6th), certiorari denied, 299 U. S. 573.

On the other hand, the Court of Claims has held that a credit against a barred deficiency is a nullity. See *Parks & Woolson Mach. Co.* v. *United States*, 58 F. (2d) 868 (C. Cls.), certiorari denied, 287 U. S. 634; *First Nat. Bank of Beaver Falls* v. *United States*, 8 F. Supp. 484 (C. Cls.), certiorari denied, 294 U. S. 717; *American Steam Conveyor Corp.*, v. *United States*, 10 F. Supp. 571 (C. Cls.), certiorari denied, 296 U. S. 599.

In *United States* v. *Bertelsen & Petersen E. Co.*, No. 416, present Term, where an overpayment for 1917 was credited against an allegedly barred deficiency for 1918, the jurisdiction of the District Court to entertain the suit as one for the year 1917 was sustained by the Circuit Court of Appeals, without mentioning Section 609 of the Revenue Act of 1928.

If those decisions are sound which hold that a credit of an overpayment for one year against a barred deficiency for another year is not a nullity, but that by such a credit the deficiency is collected by the Commissioner, then we submit that there is no valid ground for distinguishing a credit against a barred deficiency from a credit against a non-barred deficiency. In that case the arguments advanced in Point I, *supra*, with respect to the credit against the non-barred deficiencies for 1926 to 1928 are equally applicable to the credit against the barred deficiency for 1921, and, on those arguments, we believe that the credit precludes suit for the original year of overpayment. There is much to commend this interpretation of these sections.

Sections 607 to 611, inclusive, of the Revenue Act of 1928 were enacted to replace Section 1106 (a) of the Revenue Act of 1926. The latter section had failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund, and was repealed by Section 612 of the Revenue Act of 1928 as of February 26, 1926, the date of its enactment. See S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42, *infra*, pp. 48–51.

Section 1106 (a) of the Revenue Act of 1926 had provided, among other things, that the bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but that no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax.

The legislative history of Section 1106 (a) of the Revenue Act of 1926 shows that it was proposed in order to avoid the effect of a decision of the Court of Claims in *Tozaway Mills* v. *United States*, 61 C. Cls. 363, 372, holding that if a tax had been collected after the running of the statute of limitations the taxpayer could not set up that fact as entitling him to recover, but could establish a right to a refund only by proving that there had been an overpayment of the tax, on the theory that the stat-

ute of limitations did not extinguish the liability but merely barred the remedy. See *Helvering* v. *Newport Co.*, 291 U. S. 485, 489.

The Joint Committee on Internal Revenue Taxation, in recommending a change in Section 1106 (a) of the Revenue Act of 1926, stated (H. Doc. No. 139, 70th Cong., 1st Sess., p. 16):

> Prior to the enactment of the 1926 Act there was doubt as to the legal effect of the bar of the statute of limitations. Was the taxpayer entitled to recover amounts paid after the statutory period if prior thereto he owed that amount of additional tax? Was it important whether the payment after the period was made freely or under duress? These and related questions were the subject of section 1106 (a). Unfortunately the section appears to contain elements of doubt which should be clarified. The principal results of the recommendations submitted is that the bar of the statute, whether against the Government or the taxpayer, shall have the same general effect as though the barred obligation had been satisfied (so far as collecting it after the expiration of the period is concerned), and that payments by either after the period shall be deemed to be overpayments to be recovered in the same general manner as an ordinary overpayment within the period. • • •

True the word "void" is used in Section 609 of the Revenue Act of 1928 in referring to a credit

against a barred liability, whereas the word "overpayment" is used in Section 607 in referring to a payment in cash of a barred liability. However, the word "void" does not necessarily mean a "nullity." As this Court said in *Ewell* v. *Daggs*, 108 U. S. 143, 148–149:

> It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be "void and of no effect." But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. • • •

See also *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 311.

The Revenue Acts impose the right and duty upon the Commissioner of Internal Revenue to make credits. Often the question whether a deficiency is barred from assessment or collection involves complicated matters of fact and of law. Thus in *United States* v. *Bertelsen & Petersen E. Co.*, No. 416, present Term, four independent reasons were advanced by the Government in the court below as to why the assessment of the deficiency there involved should have been considered timely. The

Circuit Courts of Appeals were in conflict on one of the grounds advanced by the Government, that is, whether a waiver may be valid although not signed by the Commissioner. See *Stearns Co.* v. *United States,* 291 U. S. 54, 59. Clearly if there were a question as to whether a deficiency in taxes was barred from assessment or collection, the Revenue Acts contemplate that the Commissioner should determine that question initially and should act in accordance with his conclusion. If he concludes that the deficiency is not barred, he is certainly contemplated that he will proceed to have it collected. Even though a taxpayer could establish that collection of a deficiency is barred, it may not prevent its collection. Conditions precedent to an adjudication of that question, as in the case of an alleged erroneous deficiency, are to pay the tax, file claim for refund, and then sue. See *Graham* v. *duPont,* 262 U. S. 234; *Mellon* v. *Mertz,* 82 F. (2d) 872 (App. D. C.), certiorari denied, 299 U. S. 548.

As the Commissioner is under a duty to have an assessment of a deficiency collected if he concludes that collection is not barred, there is equally a duty upon him to credit an overpayment for one year against a deficiency if he thinks the deficiency is properly collectible. Since the matter is one committed to the Commissioner's discretion, a *prima facie* presumption of correctness of a credit will result from the action of the Commissioner in making the credit. Section 609 is entitled "Erroneous

Credits," and provides in effect that a credit shall be void if it is against a deficiency which is barred from assessment or collection. It is a reasonable construction to say that it was intended to prohibit a credit against a deficiency which the Commissioner conceded was barred, and thus deprive the Commissioner of a right which he had deemed to be his until the passage of the Revenue Act of 1926. Cf. *Toxaway Mills* v. *United States, supra; Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346. Cf. also *McEachern* v. *Rose*, 302 U. S. 56, where a credit had not been made but the Commissioner relied upon a concededly barred deficiency for one year as a reason why the taxpayer was not entitled to recover an overpayment for another year. See also *Stone* v. *White*, 301 U. S. 532, 538. However, where the Commissioner does not concede that the assessment or collection of a deficiency is barred, a different question is presented as to the course to be taken in securing an adjudication of that underlying question upon the outcome of which will depend the conclusion whether the credit is or is not "void." The real question to be litigated is whether the Commissioner erred in his determination that assessment or collection was not barred. Hence the same procedure should be followed in securing an adjudication of that question as in securing an adjudication of the question whether the Commissioner erred in determining the amount of taxes due. A collector of internal revenue would have no part in the initial determination of the

question whether a deficiency is barred from assessment or collection, and he would have no part in the crediting of an overpayment against the deficiency. It is possible that he may have died or have resigned years before the credit occurred, and yet, under the taxpayer's theory, he or his executor might be compelled to defend the correctness of the Commissioner's action in which he had no participation. The question is one which relates solely to the year of deficiency and to the action of the Commissioner, and accordingly we submit that suit should be brought for the year of deficiency and in the only forum where the United States has consented to be sued for the acts of the Commissioner where the amount involved exceeds $10,000, that is, the Court of Claims.

And as a condition precedent to suit, we submit that the taxpayer must file a claim for refund directing the Commissioner's attention to the grounds for asserting that the Commissioner's action is erroneous, and afford him the opportunity for correcting any error that he may have committed. Here no claim for refund was filed for the years to which the credits were applied, nor was any claim for refund filed for the original years of overpayment containing as a ground for refund the alleged erroneous action of the Commissioner in making the credit. Irrespective of the conclusion as to the proper year for suit and as to the proper forum, the present suit should be dismissed because proper claims for refund have not been filed.

CONCLUSION

1. The complaint does not state a proper cause of action against the United States within the jurisdiction of the District Court for the recovery of those parts of the overpayments for 1922 to 1925 applied as credits against non-barred deficiencies in excess of $10,000 for other years because—

(a) The credit of an overpayment against a deficiency constitutes an absolute defense to a suit for overpayment, and such credit is shown by the complaint itself.

(b) The real issue sought to be litigated is the correctness of the assessments for the years of deficiencies collected by the credits, and the District Court could have no jurisdiction of those years because the collections were not by a collector of internal revenue, and because no claims for refund were filed for the years of deficiency.

(c) No claims for refund were filed for the years of overpayment directing the Commissioner's attention to the ground relied on for recovery, namely, the alleged erroneous credits by the Commissioner.

2. The same reasons which compel the conclusion that the credits to the non-barred deficiencies preclude the maintenance of the present suit in the District Court require the conclusion that no cause within the jurisdiction of the District Court has been stated as to the credits to the barred deficiency.

The judgment of the court below should be reversed, with directions that the complaint be dismissed.

Respectfully submitted.

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JANUARY 1939.

APPENDIX

Revised Statutes:

SEC. 3226 [as amended]. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672–1673.)

SEC. 3228 [as amended]. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected,

or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

* * * * *

(U. S. C., Title 26, Sec. 1433.)

Judicial Code, as amended:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, * * *; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, pen-

> alty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. • • • All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Act of March 3, 1875, c. 149, 18 Stat. 481, as amended by the Act of March 3, 1933, c. 212, 47 Stat. 1489, Sec. 13:

> That when any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the

same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff. (U. S. C., Title 31, Sec. 227.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 606. CLOSING AGREEMENTS.

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) *Finality of agreements.*—If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, re-

fund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

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(U. S. C., Title 26, Sec. 1660.)

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. U. S. C., Title 26, Sec. 1670.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1675.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 321. OVERPAYMENT OF INSTALLMENT.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against

the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in Section 322.

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

(c) *Effect of petition to board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer

for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) *Overpayment found by board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

(e) *Tax withheld at source.*—For refund or credit in case of excessive withholding at the source, see section 143 (f).

H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33–34:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the

legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have

been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new Bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATIONS AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this Act, of a claim filed within the proper period and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or a credit of a barred overpayment against a deficiency which is not barred, shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608. In other words, the credit is void if either the deficiency or the overpayment is barred.

Section 609 applies to any credit made before or after the enactment of this Act.

S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 act is repealed as of its effective

date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitation against the United States and section 608 relates to the effect of the expiration of a period of limitation against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made pursuant to an assessment after the expiration of the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). It is immaterial whether the payment was voluntary or involuntary, and duress is also of no significance in determining the right to recover an amount paid after the statute has run. An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

The section has been rewritten by a committee amendment in somewhat simpler language.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also,

neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 act or section 606 of the new bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this act, of a claim filed within the proper period, and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

It seems desirable to provide some means whereby, in connection with questions of broad application to a great number of cases, one test suit may be brought and all the other cases involving the same point may be held in abeyance until the test suit is decided. Accordingly, the committee proposes to amend the House bill by inserting in section 608 a provision to the effect that in cases of the kind described the commissioner and the taxpayer may execute an agreement suspending the running of the statute of limitations for filing suit until final decision in the test case or cases named in the agreement. This amendment will prevent a multiplicity of suits without disturbing in any way the desirable policy embodied in the provisions of the House bill. It will be noted that the agreement is not that the parties thereto shall be bound by the test case in the settlement of the tax liability.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or

a credit of a barred overpayment against a deficiency which is not barred shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608.

Section 609 applies to any credit made before or after the enactment of this act.

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